CRIMINAL APPEAL NO.377 OF 1988
with
Criminal Appeal No.477 of 1988
and
Criminal Appeal No.478 of 1988

Date of decision: 28.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Criminal Appeal No.377 of 1988.
Mr. Arun H. Mehta, advocate for the appellant.
Mr. K.P. Raval, A.P.P. for respondent-State.

Criminal Appeal No. 477 of 1988
Mr. K.P. Raval, A.P.P. for appellant-State.
Mr. Arun H. Mehta, advocate for respondent.

Criminal Appeal No.478 of 1988
Mr. K.P. Raval, A.P.P. for appellant-State.
Mr. Arun H. Mehta, for respondent.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

February 28, 1996.

Common oral judgment (Per Shelat, J.)

These three appeals are directed against the judgment and order dated 31.3.1988, passed by the learned Additional City Sessions Judge, Ahmedabad, in Sessions Case No.140 of 1987 on his file whereby Shankerprasad Gurudevprasad Vaniya came to be convicted of the offence under Section 20 (b) (ii) read with Section 8 (c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act') and Section 66 (A)(b) of the Bombay Prohibition Act, and sentenced to rigorous imprisonment for ten years and fine of Rs.1,00,000/- in default, rigorous imprisonment for three years more for the offences under NDPS Act and rigorous imprisonment for three months and fine of Rs.500/-, in default, rigorous imprisonment for one month more, with regard to the offence under the Bombay Prohibition Act, while accused No.2 Rajaram Ratu Kunbhi came to be acquitted.

2. Bhimsinh G. Khant, who was in the month of May 1987 serving as Police Inspector in Railway Police Station at Ahmedabad received information that some persons were to bring charas or other psychotropic substances from outside the State and, therefore, he called the members of his staff and also Panchas and made them aware what role they had to play. On 3.5.1987 at about 9 A.M. near the Railway Police Station on the platform and other places the members of the staff and panchas were deployed. At 10.30 A.M. some times after the train arrived, Mr. Khant was informed by the Head Constable Arunsinh Prabhatsinh Gohil that near Rickshaw channel, two suspects were found, and were to be searched. He went there and found that the Head Constable Arunsinh had detained two persons. They were then intercepted and searched. From the possession of Shankerprasad Gurudevprasad Vaniya, charas weighing 18 Kgs, to the tune of Rs.54,000/- was found. He had brought the same from other State. He was having no licence or permit to possess or transport or import the same. Rajaram Ratu Kunbhi was with him. He had assisted Shankerprasad Gurudevprasad Vaniya in importing the charas, and had also agreed to deal with the same later on after successfully importing into the State of Gujarat. A complaint was then lodged and investigation was put to motion. At the conclusion of the investigation, Mr. Khant filed the charge-sheet against Shankerprasad Gurudevprasad Vaniya and Rajaram Ratu Kunbhi for the

aforesaid offences before the Court of the Metropolitan Magistrate at Ahmedabad. As the learned Metropolitan Magistrate was not competent in law to hear and decide, he committed the case to the City Sessions Court at Ahmedabad, which came to be registered as Sessions Case No.140 of 1987. The then learned City Sessions Judge had assigned the case to the then learned Additional City Sessions Judge, Ahmedabad, for hearing and disposal in accordance with law. A charge was framed to which both accused pleaded not guilty. The prosecution then led necessary evidence and at the conclusion of the hearing the learned Judge below found that Shankerprasad Gurudevprasad Vaniya had committed the offences and the charge against him was duly proved by the prosecution. He, therefore, convicted him as aforesaid. It was found that charge against Rajaram Ratu Kunbhi was not established and, therefore, he came to be acquitted. Feeling aggrieved by the judgment and order of conviction and sentence, Shankerprasad Gurudevprasad Vaniya has filed Criminal Appeal No.377 of 1988 and has assailed the judgment and order on few grounds. The State has filed Criminal Appeal No.477 of 1988 against Shankerprasad Gurudevprasad Vaniya for enhancement of the sentence, while the State has also filed another appeal being Criminal Appeal No.478 of 1988 against Rajaram Ratu Kunbhi, accused No.2, who has been acquitted by the trial Court, wherein the order of acquittal is challenged. Thus, all the three appeals are before us.

3. Before we proceed, it may be stated that as all the three appeals arise out of the same judgment and order and in all the three appeals the points to be decided being common we preferred to hear all the three appeals together and dispose the same of by a common judgment. Accordingly, we have heard all the three appeals and by this common judgment all the three appeals shall stand disposed of.

4. The learned advocates representing the parties in all the three appeals have raised several points and have urged us to pass favourable order on these counts. We do not think it necessary to dwell upon all the points raised before us for the simple reason that on two main points, going to the root of the case, all the three appeals can conveniently be disposed of, and in comparison with those two points, the other points raised loses their vigour and importance.

5. It was contended on behalf of the convicted accused that in this case, mandatory provision of Section 50 of NDPS Act was not followed, and therefore, the whole

proceedings were vitiated. We find force in the contention raised. A similar question arose before the Apex Court in the case of Saiyad Mohd. Saiyad Umar Saiyad v. State, reported in ((1995)(2)) XXXVI (2) G.L.R. 1315, wherein, considering the relevant provision, namely, Section 50 of the NDPS Act, it is held that it is obligatory on the part of the investigating agency to inform the citizen that he has a right to have him searched in the presence of a Gazetted Officer or a Magistrate, and failure to inform the citizen accordingly and not affording opportunity to the citizen is fatal to the prosecution. No presumption can be drawn that the police officer had discharged this duty. The onus cast on an accused under Section 54 would not cure the lacuna. If the protection mandated by the provision of Section 50 is given a go by, the prosecution must fail regardless other points favouring it. In this case the provision of Section 50 of NDPS Act is set at naught. We have perused the evidence, but nowhere we found that opportunity of being searched either by a Gazetted officer or in the presence of a Magistrate was given to both the accused, and the police officers, of their own, searched, seized charas and arrested both the accused. When the opportunity is not given under Section 50 of the NDPS Act, the mandatory provision is violated. When that is the case, the whole proceeding is vitiated and conviction and sentence cannot be allowed to be sustained, it is required to be quashed.

6. Even on other point also the conviction and sentence of the offence under NDPS Act cannot be maintained. As per Sections 42 and 43 of the NDPS Act, search, seizure and arrest are to be made by the police officer authorised in this behalf. If the police officer not authorised in this behalf carries out the search and seizure, or arrests the person in connection with the offences punishable under NDPS Act, the investigation right from the inception is bad in law and consequently the proceedings are, and the same are not at all curable. We may refer to a decision on the point in the case of State of Punjab v. Balbir Singh, (1994) 3 SCC, 299, wherein it is held that Sections 41, 42 and 43 are mandatory and they must be strictly adhered to. Non-compliance of Sections 100 and 165 of Criminal Procedure Code would not by itself vitiate the prosecution, but when special provisions are made for search and seizure under NDPS Act, they will have to be adhered to strictly, and if contrary to the provision search and seizure are made, the same would vitiate the prosecution.

7. It may be remembered that according to the

prosecution the offence alleged was committed on 3.5.1987. Prior to it no notification was issued by the State Government authorising the police officers to carry out search and seizure; and arrest the person if offence under the NDPS Act was found to have been committed. The police was finding it difficult to deal with such situations for want of authorisation, and it seems in that regard necessary representation was made, and, therefore, the Government of Gujarat, on 15.6.1987 issued the notification empowering the police officers to carry out search and arrest of a person under Sections 42 and 43 of NDPS Act. The issuance of notification dated 15.6.1987 shows that prior to it there was no notification at all. Even in the preamble of the notification, earlier notification if at all there was any, is not mentioned, which ordinarily it is mentioned for necessary reference, and therefore, it was rightly pointed out by the learned advocate representing the accused that formerly there was no notification at all. Mr. Raval, learned A.P.P. representing the State also failed to show that there was any notification prior to the notification issued on 15.6.1987. It may be mentioned that there is a memo issued by the office of the Director General and Inspector General of Police on 22.4.1987, at Ex.78, making the position clear that till then there was no notification empowering the police officers to carry out search and seizure and, so the police was advised to pass on the investigation to the Customs Department. In effective implementation of the Act and cracking down on the culprits, the Government of Gujarat, on 15.6.1987, for the first time issued the notification and invested necessary powers in the police officers regarding the search and seizure to be carried out and also arrest to be made under Sections 42 and 43 of the NDPS Act. In view of the matter, it is clear that on the date of the offence there was no notification investing the powers in the police officers to carry out search and seizure, and arrest the accused. The search and seizure carried out and arrest of the accused made in this case were therefore unauthorised and so are bad in law. The prosecution must therefore fail on this ground also.

8. In view of these two points going to the root of the case, the conviction and sentence under NDPS Act cannot be maintained and the same will have to be quashed.

9. The accused No.1, Shankerprasad Gurudevprasad Vaniya, is convicted of the offence under the Bombay Prohibition Act too. Under that Act the stringent provisions we find in NDPS Act are not enacted and the search and seizure

made by police officers will certainly be valid under the provisions of the Bombay Prohibition Act, and, therefore, on the above stated two grounds, Shankerprasad Gurudevprasad Vaniya, cannot take the advantage and have his conviction and sentence set aside in respect of the offence under Bombay Prohibition Act. We have perused the records and found that the learned Judge below has rightly appreciated the evidence and convicted Shankerprasad Gurudevprasad Vaniya for the offence under Section 66 (A)(b) of the Bombay Prohibition Act. We see no reason to upset the same. On query, Mr. Mehta, the learned advocate representing Shankerprasad Gurudevprasad Vaniya has failed to point out anything on record which would enable us in law to up-set the conviction and sentence inflicted, and, therefore, the same will have to be maintained. He also fairly conceded that conviction and sentence for offence under Section 66 (A)(b) of the Bombay Prohibition Act would have to be maintained.

10 For the aforesaid reasons, the Criminal Appeal No.377 of 1988 will have to be partly allowed. As the proceedings under NDPS Act are bad in law right from the inception question of enhancement does not arise for consideration and, therefore, Criminal Appeal No.477 of 1988 is required to be dismissed. When Shankerprasad Gurudevprasad Vaniya, the main accused cannot be convicted for the aforesaid reason for the offence under the NDPS Act, Rajaram Ratu Kunbhi also cannot be convicted for abetment under the NDPS Act, and, therefore, the appeal preferred by the State being Criminal Appeal No.478 of 1988 also fails.

11 In the result, the Criminal Appeals No.477 of 1988 and 478 of 1988 are hereby dismissed, while the Criminal Appeal No.377 of 1988 is partly allowed. The conviction and sentence inflicted by the lower Court on Shankerprasad Gurudevprasad Vaniya, the accused No.1, with regard to the offence under Section 20 (b) (ii) read with Section 8 (c) of the NDPS Act, are hereby set aside and quashed, and he is acquitted thereof. Fine, if paid, be refunded. The conviction and sentence inflicted by the lower Court with regard to the offence under Section 66 (A)(b) of the Bombay Prohibition Act on him are hereby maintained. By now he has already served out the sentence we are maintaining, and therefore, he is entitled to be released from the jail immediately if no longer required in any other matter. He be set at liberty forthwith if no longer required in any other matter. The muddamal to be disposed of as per order of trial Court.